

1  
2  
3  
4  
5  
6  
7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 VALARIA MASHANA AUSLER,

11 Plaintiff,

12 v.

13 PACIFIC MARITIME ASSOCIATION and  
14 DOES 1-10, inclusive,

15 Defendants.

No. C07-261Z

ORDER

16 THIS MATTER comes before the Court on a motion for summary judgment brought  
17 by defendant Pacific Maritime Association (“PMA”), docket no. 17. Having considered all  
18 papers filed in support of and in opposition to PMA’s motion for summary judgment, the  
19 Court enters the following Order.

20 **Background**

21 Plaintiff, Valaria Ausler, is an African American woman who was employed as a  
22 longshore worker in Seattle. Complaint, docket no. 3, ¶¶ 1, 3. She alleges that white  
23 employees flunking drug and alcohol tests were given a second retest and that she was not  
24 allowed to be retested because of her race. *Id.* ¶ 1. Defendant is an employer association  
25 which serves as a collective bargaining agent for steamship, stevedoring, and marine terminal  
26 operating companies on the west coast. Declaration of Joseph T. Weber (“Weber Decl.”),

1 docket no. 18, ¶ 2. Defendant claims that all longshore workers who fail a “preemployment”  
2 drug test are expelled from the industry without being allowed to take a second test,  
3 regardless of race. *See id.* ¶¶ 7-8.

4 Pursuant to a collective bargaining agreement covering west coast ports, longshore  
5 workers generally receive daily work assignments through dispatch halls to different PMA  
6 employers on different days, depending on the number and location of ships in the port. *Id.*  
7 ¶ 3. Class A-registered workers have priority in dispatch to work assignments, followed by  
8 Class B limited registrants. *Id.* After registered longshore workers have been dispatched,  
9 other workers are hired as “casuals.” *Id.* “Casuals” are divided into “identified casuals” and  
10 “unidentified casuals.” *Id.* Unidentified casuals are the newest entry level workers on the  
11 waterfront. *Id.* Plaintiff was an unidentified casual. *Id.* ¶ 8.

12 The Joint Coast Labor Relations Committee (“CLRC”), which is made up of union  
13 and management representatives, regulates labor relations in west coast ports. *Id.* ¶ 4. The  
14 CLRC issues coastwide rules regarding entry into and dismissal from the industry, including  
15 drug and alcohol testing requirements. *Id.* Longshore workers are drug screened in various  
16 situations. *Id.* ¶ 8. One situation for drug screening is during “preemployment.” At all times  
17 material to this case, an unidentified casual who worked fifty hours in the industry qualified  
18 for “preemployment” testing. *Id.* This is the situation that applied to plaintiff. *Id.*

19 Casual workers are not allowed to retest under CLRC rules. *Id.* On April 21, 2004,  
20 for example, the CLRC denied the request, based on CLRC rules and guidelines, of three  
21 Caucasian “unidentified casuals” to retake the drug and alcohol test. *Id.* In addition, records  
22 produced by defendant show that casual longshore workers who fail the preemployment drug  
23 test are placed on inactive status regardless of race. *Id.* ¶¶ 13-14 and Exhibit L. The records  
24 show that out of approximately 140 casuals who failed the preemployment drug test since  
25 1990, all but one are on “inactive” status, meaning they left the industry after failing the drug  
26 test and never returned. *Id.* The one worker who was allowed to reenter the industry was

1 able to satisfy certain hourly requirements, which most unidentified casual workers,  
2 including plaintiff, cannot satisfy. *Id.*

3 Plaintiff began as an entry level employee in 2003. Complaint ¶ 22. She completed  
4 fifty hours of work and became eligible for various testing in early 2004. *Id.* ¶ 23. Plaintiff  
5 then took the drug screen test in June 2004. *Id.* ¶ 24. Her marijuana screen came back  
6 positive, and she requested that a retest be performed on the remainder of the sample already  
7 provided. *Id.* ¶ 25. The retest also came back positive. Declaration of Sandra Starkey,  
8 docket no. 20, ¶ 4 and Exhibit B.<sup>1</sup> Plaintiff was then placed on “no dispatch” due to her drug  
9 test failure. Complaint ¶ 26. Defendant denied plaintiff’s request to retake the test with a  
10 new sample. *Id.* ¶ 26.

11 Plaintiff filed a charge with the Equal Employment Opportunity Commission and later  
12 received a right to sue letter. *Id.* ¶¶ 7-8.

### 13 **Discussion**

#### 14 **A. Motion to Strike**

15 Defendant moves to strike the Amended Declaration of Roderick C. Demmings,  
16 docket no. 24. Revised Reply and Motion to Strike, docket no. 28. Plaintiff seeks admission  
17 of the Demmings declaration and therefore bears the burden of proof of admissibility.  
18 *Pfingston v. Ronan Eng’g Co.*, 284 F.3d 999, 1004 (9th Cir. 2002). Defendant argues that  
19 Mr. Demmings does not have personal knowledge, as required by FRE 602, of either the  
20 results of Ms. Fairbanks’s drug test or of any drug test retake. Defendant also argues that  
21 Ms. Fairbanks’s statement that she failed her drug test is hearsay. Plaintiff does not respond  
22 to defendant’s objection and motion to strike, which under Local Rule CR 7(b)(2) may be

---

23  
24 <sup>1</sup> In addition, defendant agreed to have a third-party expert review drug-testing protocol to ensure  
25 that the testing of plaintiff’s specimen complied with accepted standards. Declaration of Thomas  
26 Edwards, docket no. 21, ¶ 4 and Exhibit A. The expert concluded that proper testing procedures  
were followed and confirmed that the test results indicated recent use of marijuana by plaintiff. *Id.*  
¶ 8 and Exhibit C.

1 considered as an admission that the motion has merit. The Court GRANTS defendant's  
2 motion to strike in part, and strikes as hearsay the portion of paragraph six of the declaration  
3 stating "While there, I over heard a conversation between Elizabeth Fairbanks and Robert  
4 Dalzell. Ms. Fairbanks stated that she had failed the drug test and wondered what she should  
5 do next."

6 **B. Summary Judgment Standard**

7 The Court should grant summary judgment if no genuine issue of material fact exists  
8 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The  
9 moving party bears the initial burden of demonstrating the absence of a genuine issue of  
10 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it  
11 might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby,*  
12 *Inc.*, 477 U.S. 242, 248 (1986). In support of its motion for summary judgment, the moving  
13 party need not negate the opponent's claim, *Celotex*, 477 U.S. at 323; rather, the moving  
14 party will be entitled to judgment if the evidence is not sufficient for a jury to return a verdict  
15 in favor of the opponent, *Anderson*, 477 U.S. at 249.

16 When a properly supported motion for summary judgment has been presented, the  
17 adverse party "may not rely merely on allegations or denials in its own pleading." Fed. R.  
18 Civ. P. 56(e)(2). The non-moving party must set forth "specific facts" demonstrating the  
19 existence of a genuine issue for trial. *Id.*; *Anderson*, 477 U.S. at 256.

20 **C. Plaintiff's Claims**

21 Under Title VII, 42 U.S.C. § 1981, and chapter 49.60 RCW, in the absence of direct  
22 evidence of discrimination, courts employ the three-part burden-shifting framework first  
23 articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Surrell v. Cal.*  
24 *Water Serv. Co.*, 518 F.3d 1097, 1105 (9th Cir. 2008) ("Typically, we apply the familiar  
25 *McDonnell Douglas* burden shifting framework for Title VII and § 1981 claims. A plaintiff  
26 may alternatively proceed by simply producing 'direct or circumstantial evidence

1 demonstrating that a discriminatory reason more likely than not motivated the employer.”  
2 (citations omitted)); Hines v. Todd Pac. Shipyards Corp., 127 Wn. App. 356, 370-71, 112  
3 P.3d 522 (2005) (“Washington courts have adopted the McDonnell Douglas/Burdine three-  
4 part burden allocation framework for disparate treatment cases.” (citing McDonnell Douglas  
5 and Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981))).

6 To present a prima facie case of disparate treatment, the plaintiff must prove that  
7 (i) she is a member of a protected class, (ii) she was qualified for her position, (iii) she  
8 experienced an adverse employment action; and (iv) similarly situated individuals outside her  
9 protected class were treated more favorably, or that “other circumstances surrounding the  
10 adverse employment action give rise to an inference of discrimination.” Bodett v. CoxCom,  
11 Inc., 366 F.3d 736, 743 (9th Cir. 2004) (quoting Peterson v. Hewlett-Packard Co., 358 F.3d  
12 599, 603 (9th Cir. 2004)); see also Clarke v. Office of the Attorney Gen., 133 Wn. App. 767,  
13 788-89, 138 P.3d 144 (2006).

14 Only if a plaintiff presents sufficient evidence of a prima facie case does the burden  
15 shift to the employer to provide evidence of legitimate, nondiscriminatory reasons for its  
16 actions. See Surrell, 518 F.3d at 1106, 1108; see also Hines, 127 Wn. App. at 371. The  
17 final burden rests on the plaintiff to produce evidence that the asserted reasons are merely a  
18 pretext for discrimination. See Surrell, 518 F.3d at 1106, 1108; Hines, 127 Wn. App. at 371.

19 To establish pretext, the plaintiff must put forward specific evidence indicating that  
20 the articulated nondiscriminatory reasons are “unworthy of belief.” Hines, 127 Wn. App. at  
21 372; see Lindahl v. Air France, 930 F.2d 1434, 1437-38 (9th Cir. 1991) (“We have made  
22 clear that a plaintiff cannot defeat summary judgment simply by making out a prima facie  
23 case. . . . ‘[T]he defendant’s articulation of a legitimate nondiscriminatory reason serves . . .  
24 to shift the burden back to the plaintiff to raise a genuine factual question as to whether the  
25 proffered reason is pretextual.’ . . . [The plaintiff] must produce specific facts either directly  
26 evidencing a discriminatory motive or showing that the employer’s explanation is not

1 credible.”). “Speculation and belief are insufficient to create a fact issue as to pretext. Nor  
2 can pretext be established by merely conclusory statements of a plaintiff who feels that he  
3 has been discriminated against.” Hines, 127 Wn. App. at 372 (quoting McKey v. Occidental  
4 Chem. Corp., 956 F. Supp. 1313, 1319 (S.D. Tex. 1997)). Moreover, summary judgment  
5 may be granted in favor of an employer even when the employee has created a weak issue of  
6 fact concerning pretext, if abundant, uncontroverted, independent evidence indicates that no  
7 discrimination occurred. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148  
8 (2000); see also Tyner v. Dep’t of Soc. & Health Servs., 137 Wn. App. 545, 564, 154 P.3d  
9 920 (2007).

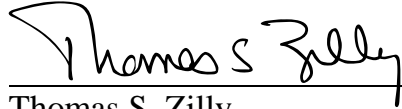
10 Here, plaintiff fails to present a prima facie case. She offers no admissible evidence  
11 that non-protected employees were treated more favorably with respect to retaking a drug  
12 screen test, and the circumstances surrounding the adverse employment action do not give  
13 rise to an inference of discrimination. Because plaintiff has not established a prima facie  
14 case the burden does not shift to the defendant to produce evidence of legitimate,  
15 nondiscriminatory reasons for its actions. See Surrell, 518 F.3d at 1106, 1108; see also  
16 Hines, 127 Wn. App. at 371.

17 Even if plaintiff had established a prima facie case, defendant has provided a  
18 legitimate, nondiscriminatory reason for expelling plaintiff: she failed the preemployment  
19 drug screen test, which disqualified her from dispatch according to a well-established,  
20 collectively-bargained rule. See Weber Decl. ¶¶ 7-15. As such, under the burden-shifting  
21 framework, plaintiff must show that defendant’s articulated reason is pretextual. However,  
22 plaintiff does not offer any admissible evidence of pretext, such as comparative evidence,  
23 statistical evidence, or discriminatory statements and admissions. See Miles v. M.N.C.  
24 Corp., 750 F.2d 867, 870 (11th Cir. 1985) (discussing the three types of evidence a plaintiff  
25 can use to prove pretext).

1 Because plaintiff fails to establish a prima facie case and fails to offer any admissible  
2 evidence of pretext, the Court GRANTS defendant's motion for summary judgment, docket  
3 no. 17, and DISMISSES with prejudice all of plaintiff's claims.

4 IT IS SO ORDERED.

5 DATED this 26th day of September, 2008.

6  
7   
8 Thomas S. Zilly  
United States District Judge  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26